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Contemporary Cars, Inc. d/b/a Mercedes-Benz of Orlando and International Association of Machinists and Aerospace Workers, AFL-CIO. Case 12-CA-26377

August 28, 2009

### **DECISION AND ORDER**

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on June 12, 2009, the General Counsel issued the complaint on June 25, 2009, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 12–RC–9344. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); Frontier Hotel, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On July 13, 2009, the General Counsel filed a Motion for Summary Judgment. On July 15, 2009, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

Ruling on Motion for Summary Judgment<sup>1</sup>

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of the unit determination.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding.<sup>2</sup> See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

### FINDINGS OF FACT

#### I. JURISDICTION

At all material times, the Respondent, a Florida corporation, with an office and place of business located at 810 North Orlando Avenue, Maitland, Florida, has been engaged in the sales, leasing, and service of new and preowned vehicles.

During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting its business operations described above, derived gross revenues in excess of \$500,000, and purchased and received at its Maitland, Florida facility, goods and materials valued in excess of \$50,000 directly from points located outside the State of Florida.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union, International Association of Machinists and Aerospace Workers, AFL–CIO, is

The Respondent also contends as an affirmative defense that the Board's December 15, 2008 Order denying the Respondent's Request for Review is illegitimate and carries no weight, because the two-member panel that issued the Order lacked the authority to do so. This defense is without merit for the reasons set forth in fn. 1.

<sup>&</sup>lt;sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See Snell Island SNF LLC v. NLRB, 568 F.3d 410 (2d Cir. 2009); New Process Steel v. NLRB, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); Northeastern Land Services v. NLRB, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

<sup>&</sup>lt;sup>2</sup> The Respondent's answer denies complaint par. 5(a), which sets forth the appropriate unit, and alleges as an affirmative defense that the unit is inappropriate. The unit issue, however, was litigated in the underlying representation proceeding. (In his Decision and Direction of Election, the Regional Director found the petitioned-for unit to be appropriate, and on December 15, 2008, the Board denied the Respondent's Request for Review.) Further, the Respondent's answer denies complaint par. 6, which alleges that by letter dated April 17, 2009, the Union requested that the Respondent recognize and bargain with it. The Respondent's answer avers that the Union's letter did not explicitly request that the Respondent recognize and bargain with it. However, in the Respondent's June 4, 2009 letter in response to the Union, the Respondent specifically acknowledged that the Union had requested bargaining and information for bargaining. Moreover, it is well settled that "a request for relevant information constitutes a request for bargaining." Richmond, Div. of Pak-Well, 206 NLRB 260, 261 (1973), citing Rod-Ric Corp., 171 NLRB 922, enfd. 428 F.2d 948 (5th Cir. 1970), cert denied 401 U.S. 937 (1971). Accordingly, the Respondent's denials do not raise any litigable issues in this proceeding.

a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

### A. The Certification

Following the representation election held on December 16, 2008, the Union was certified on February 11, 2009, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time Mercedes-Benz service technicians, employed by the Employer at its facility located at 810 North Orlando Avenue, Maitland, Florida, *excluding*: all other employees, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive collectivebargaining representative of the unit employees under Section 9(a) of the Act.

# B. Refusal to Bargain

By letter dated April 17, 2009, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit. By letter dated June 4, 2009, the Respondent advised the Union that it was refusing to recognize and bargain with the Union.<sup>3</sup> We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain in violation of Section 8(a)(5) and (1) of the Act.

## CONCLUSION OF LAW

By failing and refusing since about June 4, 2009, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB

226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

### **ORDER**

The National Labor Relations Board orders that the Respondent, Contemporary Cars, Inc. d/b/a Mercedes-Benz of Orlando, Maitland, Florida, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Refusing to recognize and bargain with International Association of Machinists and Aerospace Workers, AFL-CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time Mercedes-Benz service technicians, employed by the Employer at its facility located at 810 North Orlando Avenue, Maitland, Florida, *excluding*: all other employees, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Maitland, Florida, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice

<sup>&</sup>lt;sup>3</sup> Although the complaint does not refer to the Respondent's June 4, 2009 letter refusing to bargain with the Union, the letter is attached to the General Counsel's Motion as Exh. U.

<sup>&</sup>lt;sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

to all current employees and former employees employed by the Respondent at any time since June 4, 2009.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 28, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain with International Association of Machinists and Aerospace Workers, AFL-CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time Mercedes-Benz service technicians, employed by us at our facility located at 810 North Orlando Avenue, Maitland, Florida, *excluding*: all other employees, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

CONTEMPORARY CARS, INC. D/B/A MERCEDES-BENZ OF ORLANDO